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Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., *et al.*,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

v.

PEDRO CASTRO, *et al.*,
Respondents.

NANCY B. BEECHER, *et al.*,
Petitioners,

v.

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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council, with written consent of all parties, respectfully submits this brief amicus curiae in support of the petitioners. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council ("EEAC") is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and to various other federal statutes, orders and regulations pertaining to nondiscriminatory employment practices.

This employment discrimination case, initially brought under Sections 1981 and 1983, involves the involuntary modification of racially-based, hiring-specific consent decrees. The First Circuit's decision approves the imposition of a racially-based layoff scheme which overrides the operation of a state statute incorporating a bona fide, "last-hired, first-fired" seniority system over the objection of the state employer. Accordingly, this case raises several issues of vital interest and concern to EEAC members: the nature of proof required to establish a violation of Section 1981; the limits of a district court's

equitable power to modify EEO consent decrees; and the legal protections afforded seniority systems.[1]

EEAC is particularly concerned about the seniority issues raised herein. Seniority systems are prevalent not only within numerous state public employment schemes,[2] but throughout American industry as well.[3] EEAC's members, as major employers of the nation's work force, have a substantial interest in helping to reinforce and ensure the validity of these seniority systems. Accordingly, because of its interest in issues involving the interpretation of Section 703(h) of Title VII, which immunizes from Title VII liability neutral, bona fide seniority systems, EEAC has filed briefs as amicus curiae with this Court in *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982); *American Tobacco Co. v. Patterson*, 97 S. Ct. 313 (1982); *California Brewers Assn. v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines*

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[1] The Commonwealth of Massachusetts in this case has also raised issues which implicate the Tenth Amendment to the Constitution, as construed by this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976). These issues, which involve the delegation of government powers within the federal system, are not addressed by the Amicus, EEAC.

[2] A schedule of citations to the seniority statutes in twenty-four jurisdictions appears on page A47 of the Petition for a Writ of Certiorari of the Boston Firefighters Union Local 718.

[3] Since passage of the Wagner Act in 1935, seniority provisions, including layoff policies, have been a mandatory subject of collective bargaining. 29 U.S.C. § 151 (1973), construed in *United States Gypsum Co.*, 94 N.L.R.B. 112, 113 (1951); *Hilton Mobile Homes*, 155 N.L.R.B. 873 (1965). Based on a 400-contract, representative sample culled from a file of more than 5,000 collective bargaining agreements currently in force, the Bureau of National Affairs reports that layoff provisions are included in 88 percent of such contracts. Seniority is the sole consideration or determining factor in 72 percent of these agreements. 2 Coll. Barg. Neg. & Cont. at 60:1 (BNA 1979).

v. Evans, 431 U.S. 553 (1977); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

The potential impact of this case on EEAC members and their seniority systems is made particularly manifest by the First Circuit's treatment of private sector case law. Although this case emanates from the public sector, the court of appeals devoted a considerable portion of its opinion to construing significant private sector seniority cases, including *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), the *Teamsters* and *Patterson* decisions, and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980). See Pet. for Cert. No. 82-185 at A16-A28. EEAC is concerned that unless the First Circuit's decision is reversed, this Court's decisions insulating from legal challenge bona fide seniority systems in the private sector may be compromised.[4]

EEAC's interest in this case also stems from the fact that an involuntary modification of an EEOC consent decree is involved. It is not uncommon for EEAC members and other employers, like the public employer in this case, to enter into consent decrees. Because the original consent decrees in this case did not include seniority adjustments for the benefit of identifiable discriminatees, they cannot properly be modified now to override neutral, bona fide seniority systems without the acquiescence of the employer.

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[4] The Court's decision in this case is likely to issue at a critical period nationwide in private sector labor-management relations. The Secretary of Commerce has indicated that current high (double-digit) unemployment figures will not begin to decline in a "marked way" until the early Spring of 1983. 111 Lab. Rel. Rep. 115 (BNA Oct. 11, 1982). Meanwhile, 1983 will be a significant year in collective bargaining, as basic agreements come up for negotiation in the telephone, steel, aerospace, aluminum, longshore, glass, lumber, and tobacco industries. *Id.* at 112. Thus, the importance at this time of reaffirming the absolute legitimacy of seniority systems implemented without discriminatory intent cannot be overemphasized.

STATEMENT OF THE CASE

The case has its genesis in two employment discrimination lawsuits brought approximately ten years ago against the Boston Police and Fire Departments. The "police" case was brought in 1970 by unsuccessful black and hispanic candidates for appointment as police officers. They alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with the Police Department's recruitment and certification practices. Upon court findings that minorities were underrepresented in the police force (2.3%) vis-a-vis the city population (approximately 20%) and that the Police Entrance Examinations were not job related and were discriminatory, the First Circuit Court of Appeals in 1972 directed that a remedial order be entered to provide for preferential minority hiring. The district court and First Circuit both stressed the *absence* of intentional discrimination and premised their findings on the adverse impact of the departmental practices. Public officials entered into a comprehensive consent decree in 1973 to provide for priority pools of black and hispanic applicants. Supplemental consent decrees were approved by the district court in 1975, 1976 and 1979. By July, 1981, minority representation had risen to 11.7%.

The "fire" case was brought in 1972 by unsuccessful black and hispanic candidates for appointment as firefighters. The case followed the same pattern as the police case, except that in 1973 (shortly after Title VII was amended to cover public employees) the Attorney General of the United States also brought an action that included Title VII claims. Findings of discrimination based on minority underrepresentation (0.9%) and the non-job relatedness of the entrance examinations again resulted in a consent decree, subsequently amended several times, requiring preferential minority hiring. By July, 1981, minority representation had risen to 14.7%. For purposes of this appeal, there is no dispute that the

police and fire departments took the steps required to comply with the measures in the decree designed to remedy recruitment and hiring discrimination.

Neither the police nor the fire consent decrees addressed lay-off procedures. In 1981, however, the City of Boston was compelled to undertake a force-reduction program. Both the police and fire departments planned to make layoffs pursuant to the Massachusetts civil service statute, which requires separations from service in reverse order of seniority. Such a layoff program would result in a substantial reduction in the number of recently-hired black and hispanic officers on both forces. The Boston Chapter of the NAACP thereupon filed a motion to modify prior remedial orders to bar operation of the "last-hired, first-fired" layoff scheme.

The district court consolidated the police and fire cases. The court noted that Boston's minority population had grown to 30%, and, in an order covering both departments, enjoined them from reducing "pursuant to any departmental or city program of reduction in force on account of lack of funds or abolition of position," the percentage of minority officers below that obtaining at the commencement of the RIF program (11.7% and 14.7%, respectively). The net effect of the order was to preserve minority representation by overriding the Massachusetts seniority statute, and to lay off incumbent white employees with greater seniority.

In affirming the district court order, the First Circuit Court of Appeals concluded: (1) that the district court had the power to revise the consent decrees because the layoffs presented unforeseen circumstances which, left to the operation of the civil service statute, would undo almost all that had been accomplished by the original decrees; (2) that the district court's order properly overrides the Massachusetts seniority statute, because the consent decrees encompass "remedies to right the wrong of past discrimination," and thus "may suspend valid

state laws;" and (3) that the district court's order is not unconstitutional because of its impact upon nonminority employees, since "[t]he fact of past discrimination agreed to in both cases constitutes a 'compelling need' for a minority-conscious remedy." But the First Circuit's opinion also noted again that the discrimination being remedied was nonintentional. It also recognized that the case did *not* involve an award of seniority preferences to identifiable victims of discrimination. Indeed, the court stressed that the initial suit had not been brought to benefit individual victims but rather to cure a condition of racial imbalance resulting from hiring discrimination.

From this opinion and judgment, the Commonwealth of Massachusetts, the Boston Firefighters Union and the Boston Police Patrolmen's Association filed petitions for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

The First Circuit improperly ruled that findings of unintentional discrimination under Section 1981 are sufficient to justify court imposition of a layoff scheme that overrides a neutral, bona fide seniority system, in favor of junior, identifiable employees. Its ruling runs directly contrary to this Court's decisions requiring proof of intent to discriminate to establish Section 1981 violations, as well as this Court's rulings effectuating Congress' intent to insulate from legal challenge the operation of neutral, bona fide seniority systems.

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court concluded that intentional or purposeful discrimination must be proved in order to establish a violation of the Fifth or Fourteenth Amendment. A recent ruling of this Court similarly puts to rest any doubt that findings of intentional discrimination are necessary to prove a violation of 42 U.S.C. § 1981. *General Building Contractors Ass'n v. Pennsylvania*, 102 S. Ct. 3141 (1982). Consequently, because the First Circuit's earlier opinion in

this case lacked findings of intentional discrimination and was based only upon the adverse impact of the department's recruitment and hiring practices, it was singled out and specifically discredited by this Court in *Washington v. Davis*. See 426 U.S. at 244 n.12, *citing, inter alia, Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

Inexplicably, the First Circuit ignored this Court's specific disapproval of its earlier opinion and the importance of that disapproval in limiting the court's remedial authority. Instead, the court of appeals concluded that because the district court was seeking to effectuate the intent of its original remedial order, the effect of this Court's ruling in *Washington v. Davis* need not be resolved. The First Circuit thus elevated the inherent equitable power of a district court to modify consent decrees to a point beyond the reach of this Court's superseding decisional law.

To be sure, the equitable powers of the federal courts are broad, *United States v. Swift & Co.*, 286 U.S. 106 (1932), but they are not unlimited. Courts may occasionally be under an obligation to modify consent decrees to *conform* to intervening law, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), but to permit modification of a consent decree *contrary* to intervening law would plainly constitute an impermissible expansion of the remedy beyond the nature and extent of the violation. *Hills v. Gatreaux*, 425 U.S. 282 (1976).

The court of appeals compounded the error by approving the override of a neutral, bona fide seniority system that was not challenged as discriminatory and which clearly is protected under both Title VII and § 1981. Few principles of Equal Employment law are as firmly established as that which legally immunizes seniority systems implemented without discriminatory intent. Reflecting that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this

Nation," *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976), this Court has resolved competing interests by awarding retroactive seniority to identifiable victims of hiring discrimination while leaving bona fide seniority systems intact. *Franks v. Bowman, supra.* Such relief was designed by Congress to provide "the most complete relief possible" for victims of hiring discrimination, *Teamsters v. United States*, 431 U.S. at 347. The First Circuit's seniority override plainly is not called for here, since the First Circuit conceded the absence of identifiable discriminatees.

Congress recognized that neutral, bona fide seniority policies could have a "disparate impact" upon more recently hired minority group members, but determined as part of Title VII that the protection of bona fide seniority systems was of overriding importance. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Hence, a bona fide seniority system cannot be overriden over the objections of the employer and to the detriment of readily identifiable incumbents. *Pullman Standard v. Swint*, 102 S. Ct. 1781 (1982); *American Tobacco Co. v. Patterson*, 97 S. Ct. 313 (1982). The protections afforded such seniority systems under Title VII similarly obtain under Section 1981. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979).

As this Court concluded recently, "seniority plays a central role in allocating benefits and burdens among employees," and "we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination." *Ford Motor Co. v. EEOC*, 102 S. Ct. 3057, 3070 (1982).

This case concerns fundamentally the preservation of a bona fide seniority system in the face of a judicially-imposed scheme to achieve racial balance untied to relief for identifiable discriminatees. Accordingly, this Court need not, and should not reach a constitutional issue of

"reverse discrimination" as discussed by the First Circuit. *Spector Motor Co. v. McLaughlin*, 323 U.S. 101 (1944). This Court need only reaffirm its long line of decisional law recognizing Congress' intent to preserve bona fide seniority systems to reverse the First Circuit's order and disapprove the modification request.

ARGUMENT

I. THE COURT BELOW EXCEEDED ITS REMEDIAL AUTHORITY IN OVERRIDING A CONCEDEDLY VALID SENIORITY SYSTEM BASED UPON SUPERSEDED FINDINGS OF UNINTENTIONAL HIRING DISCRIMINATION, PARTICULARLY AS THE ORDER WAS DESIGNED TO BENEFIT PERSONS WHO WERE NOT IDENTIFIABLE VICTIMS OF DISCRIMINATION

A. Modification of the Consent Decree on the Basis of Findings of Unintentional Discrimination Expressly Contradicts *Washington v. Davis* and its Progeny

In both of these consent decree cases, suit was initially brought under 42 U.S.C. §§ 1981 and 1983. In each instance, there were court findings that recruitment and hiring discrimination was unintentional, the trial court having concluded that past discrimination was based on only the adverse effect of these practices on minorities. Since the litigation leading to the original consent decrees in these cases, this Court has clarified the burden of proof necessary to sustain a violation of Section 1981 and specifically stated that the discrimination theory underpinning the decrees in this case was incorrect. As a result, the modification of these decrees to achieve racial balance in layoffs is impermissible because the district court's modification order rests on insufficient proof to establish a violation.[8]

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[8] In the "fire" case, the United States brought an action in 1973 which included Title VII claims. See Cert. Pet. No. 82-185 at A7. The lower courts and this Court addressed the instant cases in

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court held that intentional or purposeful discrimination must be proved in order to establish a violation of the Fifth or Fourteenth Amendment. More recently, this Court confirmed that the same proof of intent is required under Section 1981. *General Building Contractors Ass'n v. Pennsylvania*, 102 S. Ct. 3141 (1981). *See also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976). Any doubt about the insufficiency of the lower court's findings of adverse effect to support constitutionally-based violations *in this particular case* was resolved in *Washington v. Davis*. For, in its opinion, this Court specifically discredited an earlier opinion of the First Circuit in this proceeding precisely because of indications of an inappropriate correlation between unintentional discrimination and constitutional violations. 426 U.S. at 244, n.12, *citing, inter alia, Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). "[T]o the extent that [*Castro v. Beecher*] rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation," this Court declared, "we are in disagreement." *Id.* at 245.

Inexcusably, the opinion of the First Circuit did not so much as make reference to this aspect of the Court's opinion in *Washington v. Davis*. Rather, the court of appeals merely expressed uncertainty over the effect of the decision on this case, and thereafter concluded that the answer made no difference. "[I]n any event," the First Circuit surmised, since the district court "conclusively established" a "pattern of relief," neither *Washington v. Davis* nor *Arlington Heights v. Metropolitan Housing De-*

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terms of the burdens of proof applicable to § 1981 actions. See *Washington v. Davis*, 426 U.S. at 244 n.12, *citing with disapproval, inter alia, Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). And, as argued below, the First Circuit clearly exceeded the remedial principles of Title VII and § 1981 as they relate to seniority systems.

velopment Corp., 429 U.S. 252 (1977),[6] "stands in the way" of consent decree modification.[7] Cert. Pet. No. 82-185 at A13. Consequently, not only did the First Circuit entirely ignore this Court's disapproval of *Castro v. Beecher*, but it used the original (and, since, determined to be insufficient) findings of unintentional discrimination in hiring to *extend* its order to layoff procedures—an area not even addressed in the original decree. In so doing, the court of appeals misread the district court's power to expand its remedial order as insulated from the legal limitations and restrictions imposed by the decisional law of this Court.

B. The First Circuit Incorrectly Modified the Consent Decree Without Conforming its Order To Intervening Law Directly Applicable to Its Earlier Substantive Discrimination Findings

Here the consent decree modification failed to take into consideration the intervening decisional law of this Court. Misconstruing the district court's power to reshape consent decrees as virtually unlimited, the court of appeals improperly approved a modification which, as shown above, runs contrary to this Court's ruling in *Washington v. Davis*.

In approving the consent decree modification as a legitimate exercise of the district court's power, the First Cir-

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[6] In *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court reaffirmed that official action will not be held unconstitutional solely because it results in racially disproportionate impact.

[7] "It is by no means clear," said the First Circuit, "that our decisions in the police and fire cases should have been different had they been decided after *Washington v. Davis* and *Arlington Heights* . . . ." Cert. Pet. No. 82-185 at A13. The court of appeals below did not elaborate on the reason for this lack of clarity, perhaps because there is no conceivable answer to the fact that its earlier opinion lacks continuing force either to support a substantive violation or to justify its broad seniority-related remedy.

cuit relied upon this Court's opinions in *United States v. Swift & Co.*, 286 U.S. 106 (1932), and *United States v. United Shoe Corp.*, 391 U.S. 244 (1968). In both cases, this Court approved significant modifications of antitrust-related consent decrees. But in neither case was modification predicated on changes that violated or contravened intervening law. Accordingly, neither case supports the view reflected in the First Circuit's opinion that once a district court approves a "pattern of relief" in a consent decree, subsequent Supreme Court decisional law is not only irrelevant, but can properly be violated in the course of consent decree modification.

Indeed, in many instances, courts are under an obligation to modify consent decrees to *conform* to intervening law. In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), for example, this Court was confronted with the refusal of a district court to modify its earlier injunction. The terms of the injunction were inconsistent with the intervening ruling in *Swann v. Board of Education*, 402 U.S. 1 (1971), and were also ambiguous. Because of these two factors, the Court held, it was an abuse of discretion for the district court *not* to modify its earlier injunction. *Cf. System Federation No. 91 v. Wright*, 364 U.S. 642, 650 n.6 (1961) ("[t]here are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction" (citing cases)).

Similarly, the effect of intervening law will sometimes so impair the validity of a consent decree that courts properly vacate the decree entirely. The First Circuit, for example, approved such a vacatur in *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975). There the court of appeals found that the district court did not abuse its discretion in vacating the decree because a subsequent Supreme Court decision "represented a fundamental

change in the legal predicates of the consent decree." *Id.* (footnote omitted). The First Circuit declared, *id.* at 602, that:

> It may well be unreasonable to require defendant, for the indefinite future, to abide by a consent decree based upon an interpretation of law that has been rendered incorrect by a subsequent Supreme Court decision.

To be sure, a change in decisional law does not necessarily *mandate* consent decree modification to conform the decree with recent case law.[8] As the Fifth Circuit has stated, however, "[w]hen an injunction *is* modified on the basis of an intervening change in decisional law, *that modification must be justified by the new decision.*" *United States v. Georgia Power Co.*, 634 F.2d 929, 934 (1981) (emphasis supplied). By the same token, a request to modify an injunction on the basis of a change in factual circumstances cannot supply any justification for a ruling *directly contrary* to intervening decisional law. By permitting the district court to reopen the decrees to reflect later factual developments relating to matters not covered previously, but at the same time ignoring Supreme Court precedent reflecting direct disapproval of its previous substantive holdings in this case, the First Circuit impermissibly expanded its equitable power.

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[8] The courts are split over whether a change in decisional law alone is sufficient ground for a Rule 60(b)(5) modification. See *United States v. Georgia Power Co.*, 634 F.2d 929, 933 (5th Cir. 1981) (cases cited therein). In any event, the intervening decisional law of this Court should not impair the validity of the original decree. As this Court observed in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1930) (emphasis supplied), an "injunction, whether right or wrong, is not subject to impeachment in its application *to the conditions that existed at its making.*"

II. FEDERAL EEO LAW, AS INCORPORATED IN STATUTE AND AS CONSTRUED BY THIS COURT, PROHIBITS EXPANSION OF THESE HIRING-BASED CONSENT DECREES TO ALTER LAYOFF PROCEDURES IN A MANNER THAT DIRECTLY OVERRIDES A NEUTRAL, BONA FIDE SENIORITY SYSTEM

A. The First Circuit's Seniority Order Was Improper Because It Was Not Limited to Remedying the Hiring Violations To Which the Remedial Provisions of the Decree Were Restricted

The power of a federal court to modify a consent decree is not unlimited but is subject, at a minimum, to the supreme law of the land, as embodied in federal statutory and decisional law. As this Court stated in *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976), a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." *Id.* at 293-94, *quoting Milliken v. Bradley*, 418 U.S. 717, 744 (1974). For several reasons, the First Circuit's Order was contrary to these elementary remedial principles.

The underlying allegations of substantive Title VII violations were limited to recruitment and hiring violations and the consent decree treated only those matters. There has been no determination that the departments failed to take the necessary steps to comply with the decrees. Moreover, there has been no challenge to the validity of the seniority systems established by state statute and respondents have conceded that laying off on a last-hired, first-laid off basis would not be an independent violation of the rights of minority officers. Accordingly, although the First Circuit purported merely to effectuate its remedial relief for hiring discrimination, it, in effect, overrode a bona fide seniority system as if the system had been found to violate Title VII.

More specifically, the consent decrees here in issue stem from court findings of unintentional discrimination in the

hiring process of the police and fire departments that led to underrepresentation of black and hispanic employees. Hiring procedures were subsequently changed in accordance with the terms of the remedial orders. In the opinion here under review, the First Circuit recites statistics demonstrating that "[t]he district court's remedial orders in both cases have produced marked progress eliminating the present and continuing effects of past discrimination." Cert. Pet. No. 82-185 at A10.

The original consent decrees made no provision for the procedures to be used if layoffs were required. The validity of layoff procedures simply was not challenged and was not in issue. The court of appeals nevertheless concluded that modification of the decrees to regulate layoffs was appropriate and required so as not to vitiate the decrees' original intended effect. The original intent of the decrees, however, was to correct the hiring procedures only. The court of appeals thus impermissibly approved use of federal equitable power beyond the scope of the remedy necessary to rectify the perceived violation. *Cf. Hills v. Gautreaux, supra; Milliken v. Bradley, supra.*

In *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), Justice Marshall spelled out how the courts should approach requests for consent decree modification. Consent decrees, he observed:

> cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

The court of appeals plainly ignored this cautionary dictum, relying on "new and unforeseen conditions" to justify a modification never contemplated by the parties and not directed to rectifying the only employment pro-

cedures the district court identified as discriminatory. Ignoring the fact that layoff procedures were specifically established by statute and beyond the power of the parties to modify, the First Circuit speculated that had the parties anticipated the need for layoffs, "they would have incorporated some provisions addressing its potential impact into the decrees." Cert. Pet. No. 82-185 at A15. Settlements, however, are "not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators," *Officers for Justice v. Civil Service Comm.*, 29 FEP Cases 1473, 1480 (9th Cir. 1982) (emphasis in original), *citing, inter alia, In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 212 (5th Cir. 1981); *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975,) *cert. denied*, 424 U.S. 967; and *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 849 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In sum, the First Circuit's ruling impermissibly would subject parties to a consent decree to a virtually unlimited power of modification by district courts whose lodestar would be their determination of what the parties would have agreed to on a certain issue if indeed they had thought about it.

B. Expansion of the Consent Decrees To Include Layoffs Impermissibly Overrode A Neutral, Bona Fide Seniority System

The First Circuit's error in approving expansion of the decrees, moreover, was particularly egregious because in doing so it thereby approved the override of a neutral, bona fide seniority system. The court of appeals in its opinion recognized that the district court's order prohibiting layoffs from reducing the current level of minority representation "superseded the operation of the reverse seniority layoff provisions" of the Massachusetts

civil service law—a law incorporating a seniority system which the court plainly addressed as "bona fide." [9] Cert. Pet. No. 82-185 at A16-17. The First Circuit also discussed those decisions of this Court in which the immunity of bona fide seniority systems under Section 703(h) of Title VII was unequivocally established. *Id.*, *citing Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); and *American Tobacco Co. v. Patterson*, 97 S. Ct. 313 (1982). The court of appeals concluded, however, that none of these cases applied here: "We find nothing in this trilogy that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption and application of a bona fide seniority system." Cert. Pet. No. 82-185 at A19.

As in its treatment of the burden of proof under Section 1981, the First Circuit ignored the clear import of this Court's decisions. In the *American Tobacco* case, for example, this Court established unconditionally that seniority provisions or systems, whether adopted before or after Title VII, are immunized under Section 703(h) [10] unless it can be proven that the adoption or maintenance of the system resulted from intentional discrimination. The protections afforded such seniority systems under Title VII similarly obtain under Section 1981. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24

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[9] Respondents readily declare that they did not seek from the courts below a determination of the invalidity of the Massachusetts seniority statute because of any discriminatory impact of its operation. Br. Op. Cert. at 16.

[10] § 703(h), in pertinent part, provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

(1979). *Wattleton v. Boiler Makers*, 29 FEP cases 1389, 1394 (7th Cir. 1982), *citing Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92 (5th Cir. 1978).[11]

The fundamental error of the First Circuit was to elevate the equitable power of district courts to the level of sanctioning orders that conflict with the unequivocal intent of Congress. It is indisputable that minority employees often possess less seniority, and that neutral and bona fide seniority systems may have a disproportionate impact on the employment opportunities of such employees. Congress *recognized* that neutral bona fide seniority policies could have a "disparate impact" upon more recently hired minority group members, but determined that the protection of bona fide seniority systems was of overriding importance.[12] As its resolution of competing interests, Congress determined that "[p]ost-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* . . . *without attacking the legality of the seniority system* as ap-

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[11] *See also Chance v. Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007, *cert. denied*, 431 U.S. 965 (1977); and *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1972) (employment practices which are not violative of Title VII should be immune from attack under § 1981).

[12] Congressional deference to the rights secured by seniority systems has been recognized by the Court in a variety of contexts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employees' religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (a bona fide seniority system that perpetuates the effects of the employer's past discrimination is nonetheless protected by § 703(h) of Title VII); *California Brewers Association v. Bryant*, 444 U.S. 598 (1980) (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

plied to them" (emphasis added). *Teamsters v. United States*, 431 U.S. at 347. Here, the First Circuit, in effectively nullifying the operation of a bona fide seniority system, acts not for the benefit of any identifiable discriminatees but only to the detriment of "the legitimate expectations" of identifiable incumbents "innocent of any wrongdoing." *Id.* at 372.

The specific legal protections afforded bona fide seniority systems, however, were disregarded by the First Circuit. "While seniority was the normal way to decide who must go first," the court of appeals acknowledged, "there is nothing magical about seniority . . . ." Cert. Pet. No. 82-185 at A25. The court's facile approach to seniority violates the clear Congressional intent, expressed in Title VII's legislative history, to preserve the operation of last-in, first-out layoff provisions under bona fide seniority systems:

> [I]t has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of race.

See 110 Cong. Rec. 7207 (1964) (statement submitted by Sen. Clark).[13]

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[13] And as stated above, this Court's decision in *American Tobacco v. Patterson* held that the protections that Title VII gives to seniority systems applies to those systems enacted both before and after

Similarly, Senators Clark and Case placed an interpretive memorandum into the Congressional Record, *id.*, which stated:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes were

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the effective date of Title VII. It should be noted that the statutory basis of the seniority system here affected does not justify treatment different from that which would obtain for a private sector, collectively-bargained seniority system. Seniority-based layoff provisions in both the public and private sector have proliferated because they reward service, loyalty and stability; they make for increased efficiency and safety in times of layoff; and, by securing each worker's place in the hierarchy of the organization, they improve labor relations. Moreover, they benefit all workers equally; as the most senior workers have paid their dues on layoff in years past, the least senior workers will be compensated for their time on layoff with job security in the future.

Neither employers nor unions have any interest in losing minority or nonminority workers. The current economic climate and the resulting layoffs are beyond the control of any single employer, union or group of workers; the alternatives to seniority-based layoffs are not always workable organizationally; a significant majority of workers have viewed and will continue to view seniority-based layoffs as the preferred alternative; and the problem, by law, is one properly within the sphere of state statute or collective bargaining. As recognized by this Court, "Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers v. Bryant*, 444 U.S. at 608. See also footnote 14, below.

> hired, to give them special seniority rights at the expense of the white workers hired earlier.[14]

Numerous circuit courts of appeals have given effect to this clear Congressional intent. The Second Circuit has explicitly declared that a facially-neutral excessing plan, which operates on the concept of "last-hired, first-fired," does not discriminate against minorities who are disproportionately affected. *Chance v. Board of Examiners, supra*, 534 F.2d at 997. The Third, Fifth and Seventh Circuits have agreed. *Id., citing Waters v. Wisconsin Steel Workers of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Central Power & Light Co. v. Local Union 327*, 508 F.2d 687 (3d Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Watkins v. Steel Workers Local 2369*, 516 F.2d 41 (5th Cir. 1975).

Similarly the First Circuit's approach fails when analyzed in light of this Court's recent reaffirmation that "seniority plays a central role in allocating benefits and burdens among employees," and that "we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." *Ford Motor Co. v. EEOC*, 102 S. Ct. 3057, 3070 (1982). The First Circuit's decision assures jobs to non-identifiable victims at the expense of innocent incumbents. Warning against this kind of situation, *id.*, the Court stated that:

> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining

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[14] *Cf. Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978) (an employer has no "duty to adopt a hiring procedure that maximizes hiring of minority employees").

> a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the "large objectives" of Title VII, *Albermarle Paper Co v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted) require innocent employees to carry such a heavy burden. (notes omitted.)

Indeed, so clear are the legal protections afforded the Massachusetts seniority statute that it was unnecessary and entirely inappropriate for the First Circuit to address an issue of "unconstitutional reverse discrimination." See Cert. Pet. No. 82-185 at A20-26. Federal courts should "avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Regents of the University of California v. Bakke*, 438 U.S. 265, 411 (Stevens, J., concurring in the judgment in part and dissenting in part). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication," this Court has declared, "it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944), *cited in Bakke*, 438 U.S. at 411. *See also Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Here, the explicit statutory protection given bona fide seniority systems provided a sufficient and adequate ground upon which to deny respondents' request for modification.

Unfortunately, in reaching out improperly to address the question of "unconstitutional reverse discrimination," the First Circuit misconstrued this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 192 (1979), suggesting that the decision supports the result reached by the court of appeals here. In *Weber*, this Court approved

a private, race-conscious affirmative action plan, recognizing that employers may engage in *voluntary* affirmative action efforts *beyond* that which they may be compelled to undertake by government regulation. Even there, the Court permitted the AAP only because it did not unnecessarily trammel the interests of the white employees" and did *"not require the discharge of white workers and the replacement with new black hires." Id.* at 207 (emphasis added). Accordingly, although *Weber* stands for the proposition that Congress did not intend to prohibit private sector employers from taking certain steps *voluntarily*, *Weber* cannot be expanded to authorize the forced abolition of a bona fide seniority system.

Subsequently, many courts have concluded that a *voluntary* affirmative action plan implemented by a state employer will not violate Title VII if it is valid under *Weber*. *La Riviere v. EEOC*, 28 FEP Cases, 1481, 1484 (9th Cir. 1982); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 688-90 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *United States v. City of Miami*, 664 F.2d 435, 461 (5th Cir. 1981) (en banc). But in the posture of this case, *no such voluntary efforts are involved.* Rather, the employer, which has been operating lawfully under a hiring-based consent decree, here seeks to preserve its statutorily-mandated, neutral seniority system, a goal which draws support from this court's *Weber* opinion.[18]

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[18] In *Weber*, this Court observed that:

> Title VII could not have been acted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisputed to the greatest extent possible." *United Steelworkers v. Weber*, 443 U.S. at 206.

See also footnote 12, *supra*.

Nor, it should be added, do this Court's decisions in *Bakke* and in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), support the result reached below. In announcing the judgment of the Court in *Bakke*, Justice Powell declared "facially invalid" the governmental purpose of assuring a specified percentage of minority participation in the university's special admission program. He stated that if no specific instance of discrimination occurred, government cannot constitutionally order racial and ethnic preference for the purpose of remedying past "societal" discrimination against minorities generally. Accordingly, since the underlying findings of discrimination in this case have been discredited by this Court earlier in *Washington v. Davis*, *supra*, there is no basis upon which *Bakke* may be used as support for the lower court's decision to change the existing seniority system.

Fullilove is equally unavailing to support the First Circuit's decision. In that case, a minority business set-aside in a federal public works program survived constitutional challenge in significant part because *Congress* had found racial discrimination in the construction industry and was exercising its enforcement powers under Section 5 of the Fourteenth Amendment to remedy the problem. 448 U.S. at 476. In this case, on the other hand, the court of appeals is approving the override of a state-enacted seniority system of the type specifically protected by Congress in Title VII.

In sum, no constitutional principles justify the override of the Massachusetts layoff provision. Moreover, given the impact of the district court's modification order on the rights of innocent, identifiable incumbents, this Court's civil rights cases prohibit the First Circuit's modification of the state's neutral, bona fide seniority system.

CONCLUSION

For the foregoing reasons, the Amicus, EEAC, respectfully urges that the decision of the First Circuit should be reversed with instructions that the District Court deny the request for modification of the consent decrees so as to preclude override of the operation of the layoff provisions incorporated in the Massachusetts seniority statute.

Respectfully submitted,

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